Ghazi Vegetable Ghee & Oil Mills Ltd v Razik Fareed International (M) Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–04–18 OF 1997
SHAIK DAUD, DENIS ONG AND HAIDAR JJCA
10 MAY 2003

Contract *— Repudiation — Contract to supply goods — Stopping payment — Buyer stopped payment on goods delivered — Whether buyer repudiated contract — Whether seller liable to deliver more goods to buyer*

Contract *— Time — Time of the essence — Variation of contract — Whether time became at large – Whether time ceased to be of the essence*

The respondent had agreed to sell to the appellant, a company incorporated in Pakistan, RDB palm oil pursuant to three contracts for the supply of 2,000 metric tons each, for delivery in November and December 1993 and in January 1994 respectively. The appellant opened irrevocable letters of credit for the first two contracts. The appellant having opened no letter of credit for the third contract no liability arose against the respondent under the third contract. Pursuant to the first contract the respondent made two partial shipments of 1,000 metric tons and some 545 metric tons of RDB palm oil on 25 October and 6 November 1993 respectively. The payments due to the respondent for these shipments was USD356,000 and some USD194,000 payable on 26 January and 3 February 1994 respectively. The respondent was unable to ship the balance under the two contracts and the appellant on 15 January 1994 agreed to extend the shipment date to 28 February 1994 in respect of the balance under the first contract and to 20 March 1994 for the shipment in respect of the second contract. However, on 25 January, more than a month before the extended shipment date, and without notice to the respondent, the appellant took out an injunction in Pakistan to stop payment by the bank in Singapore of monies due to the respondent. Although it was too late to stop payment of the USD356,000 in respect of the first shipment of 1,000 metric tons of DRB palm oil but the second payment of USD193,943.03 in respect of the second shipment of some 545 metric tons of DRB palm oil under the first contract was stopped. The respondent, taking the stand that the appellant had terminated the contracts, refused to make any further shipments to the appellant. The USD193,943.03 was eventually released to the respondent in March 1994. The appellant, however, insisted that the respondent was liable for making shipment of the balance DRB palm oil and claimed damages for breach of the two contracts. The arbitrators found for the appellant and awarded damages of some USD 713,000 and costs against the respondent. The Appeal Board concurred with the views of the arbitrators that the respondent was at fault and upheld the arbitrators' award. The learned judge of the High Court, relying on the Singapore

A case of *The Attorney-General of Singapore v Wong Wai Cheng* [1980] 1 MLJ 131, [1978-1979] SLR 151, found that the original completion date having been extended by agreement, it was within the contemplation of the parties that the original time for completion was no longer of the essence of the contract. He thus allowed the respondent's application and quashed the arbitration award on the B grounds that there was an error of law apparent on the face of the award. The appellant appealed.

Held, finding no error on the face of the High Court judgment and dismissing the appeal:

C (1) The appellant had agreed to the partial delivery of the RDB palm oil, a variation of the terms of the contracts, and to the extension of time for the completion of the delivery of the RDB palm oil. In other words, it was within the contemplation of the parties that time for completion was not of the essence of the contracts D (see pp 171H, 172B); *The Attorney-General of Singapore v Wong Wai Cheng* [1980] 1 MLJ 131, [1978–1979] SLR 151 followed.

(2) The arbitrators, as well as the Appeal Board, had failed to consider or to adequately consider the legal significance of the appellant's conduct in attempting to revoke the irrevocable letter of credit given that there had been an extension of time for the E respondent to fulfill its obligations and that such extended time had not lapsed (see p 172B).

(3) The issue of whether there had been a repudiation of the contracts was not considered or adequately considered by the arbitrators or the Appeal Board. Similarly the issue of whether time for F completion of the contracts was no longer of the essence of the contracts was not addressed or adequately addressed by the arbitrators or the Appeal Board (see p 172E–F).

(4) In the circumstances, the learned judge of the High Court was correct in following the principle laid down in *The Attorney-General of Singapore v Wong Wai Cheng*, and applying it to the facts G of this case (see p 172F–G).

[Bahasa Malaysia summary

Responden telah bersetuju menjual kepada perayu, sebuah syarikat H yang ditubuhkan di Pakistan, minyak kelapa sawit RDB menurut tiga kontrak bagi pembekalan 2,000 metrik tan setiap satu, untuk penghantaran dalam bulan November dan Disember 1993 dan January 1994 masing-masing. Perayu telah mendapatkan surat kredit yang tidak boleh ditarik balik bagi dua kontrak pertama. Memandangkan perayu tidak mendapatkan surat kredit bagi kontrak I ketiga maka tiada liabiliti yang wujud terhadap responden di bawah kontrak ketiga itu. Di bawah kontrak pertama responden telah membuat dua penghantaran sebahagian iaitu 1,000 metrik tan and

lebih kurang 545 metrik tan kelapa sawit RDB pada 25 Oktober dan 6 November 1993 masing-masing. Bayaran yang perlu dibuat kepada responden bagi penghantaran ini adalah USD356,000 dan lebih kurang USD194,000 yang perlu dibayar pada 26 Januari dan 3 Februari 1994. Responden tidak dapat menghantarkan baki di bawah dua kontrak tersebut dan pada 15 Januari 1994 perayu telah bersetuju melanjutkan tarikh ke 28 Februari 1994 bagi penghantaran baki di bawah kontrak pertama dan ke 20 Mac 1994 bagi penghantaran bagi kontrak kedua. Malah, pada 25 January, lebih sebulan sebelum tarikh penghantaran lanjutan, dan tanpa notis kepada responden, perayu telah mengambil suatu injunksi di Pakistan supaya menahan pembayaran kepada responden oleh bank di Singapura. Walaupun sudah terlambat menahan pembayaran USD 356,000 bagi penghantaran 1,000 metric tan pertama minyak kelapa sawit DRB tetapi bayaran kedua sebanyak USD193,943.03 bagi penghantaran kedua lebih kurang 545 metrik tan of minyak kelapa sawit DRB di bawah kontrak pertama telah diberhentikan. Responden, mengambil pendirian bahawa perayu telah menamatkan kontrak-kontrak tersebut, enggan membuat penghantaran seterusnya kepada perayu. Wang USD193,943.03 lambat laun dibayar kepada responden pada Mac 1994. Perayu bagaimana pun mendakwa bahawa responden masih berwajib membuat penghantaran baki minyak kelapa sawit DRB tersebut dan menuntut ganti rugi bagi kemungkiran kedua-dua kontrak tersebut. Penimbangtara mendapati bagi pihak perayu dan menawarkan ganti rugi sebanyak lebih kurang USD 713,000 dan kos terhadap responden. Lembaga Rayuan bersetuju dengan pandangan penimbangtara bahawa responden bersalah dan telah mengesahkan award penimbangtara. Hakim Mahkamah Tinggi yang arif, mengikuti kes Singapura *The Attorney-General of Singapore v Wong Wai Cheng* [1980] 1 MLJ 131, [1978–1979] SLR 151 telah memutuskan bahawa memandangkan yang tarikh penamatan asal telah dilanjutkan dengan persetujuan, maka adalah menjadi kehendak pihak-pihak bahawa masa asal bagi penyiapan tidak lagi menjadi asas intipati kontrak. Ia telah membenarkan permohonan responden dan mengenepikan award penimbangtaraan di atas alasan bahawa terdapat kesilapan undang-undang yang ketara pada permukaan award tersebut. Perayu telah merayu.

Diputuskan, mendapati tiada kesilapan pada permukaan penghakiman Mahkamah Tinggi dan menolak rayuan tersebut:

(1) Perayu telah bersetuju kepada penghantaran sebahagian minyak kelapa sawit RDB, suatu penukaran terma kontrak-kontrak tersebut, dan kepada perlanjutan masa penamatan penghantaran minyak kelapa sawit RDB. Dalam kata lain, adalah menjadi kehendak pihak-pihak bahawa masa bagi penyiapan tidak lagi menjadi asas intipati kontrak-kontrak tersebut (lihat ms 171H, 172B); *The Attorney-General of Singapore v Wong Wai Cheng* [1980] 1 MLJ 131, [1978–1979] SLR 151 diikut.

(2) Penimbangtara, mahupun Lembaga Rayuan, telah gagal mengambilkira atau menimbangkan sewajarnya maksud undang-undang kerana tingkah laku perayu dalam mencuba menarik balik surat kredit yang tidak boleh ditarik balik itu memandangkan suatu lanjutan masa telah diberikan kepada responden menunaikan obligasinya dan bahawa masa yang dilanjutkan itu belum lupus (lihat ms 172B).

(3) Isu sama ada wujudnya penolakan kontrak-kontrak tidak diambilkira atau dipertimbangkan sewajarnya oleh penimbangtara mahupun Lembaga Rayuan. Begitu juga isu sama ada masa bagi penamatan kontrak-kontrak tersebut tidak lagi menjadi asas intipati kontrak-kontrak tersebut tidak diutarakan atau tidak diutarakan sewajarnya oleh penimbangtara mahupun Lembaga Rayuan (lihat ms 172E–F).

(4) Memandangkan sedemikian hakim Mahkamah Tinggi yang arif telah bertindak betul dalam mengikuti prinsip yang diberikan dalam *The Attorney-General of Singapore v Wong Wai Cheng*, dan mengaplikasikannya kepada fakta-fakta dalam kes ini (lihat ms 172F–G).]

Notes

For cases on contracts to supply goods, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) para 3516.

For cases on time being of the essence in contracts, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 4068–4073.

Cases referred to

Attorney-General of Singapore, The v Wong Wai Cheng [1980] 1 MLJ 131; [1978–1979] SLR 151 (folld)

Legislation referred to

Arbitration Act 1952 s 24(2)
Courts of Judicature Act 1964 s 42

Appeal from: Originating Motion No R2–25–48 of 1996 (High Court, Kuala Lumpur)

Shahul Hameed Amirudin (*T Kuhendran* with him) (*Zul Rafique & Partners*) for the appellant.

Thakurdas Jethwani (*Sonia Shah* with him) (*Thakurdas Jethwani & Co*) for the respondent.

Haidar JCA (delivering judgment of the court): This appeal is against the judgment of the learned judge in the court below, who allowed the application of the respondent by way of notice of originating motion by setting aside the arbitration award published on 12 April 1996 of the Appeal Board of the Palm Oil Refiners Association of Malaysia ('PORAM') and the award of the arbitrators dated 22 November 1995 (duly accepted and

affirmed by the said Appeal Board). As is usual, the learned judge ordered costs of the application against the appellant.

The motion was filed pursuant to s 24(2) of the Arbitration Act 1952. It reads:

> (1) ...
>
> (2) where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.

The ground on which the award was set aside by the learned judge was because he found that there was an error of law apparent on the face of the award relying on the case of *The Attorney-General of Singapore v Wong Wai Cheng* [1980] 1 MLJ 131, [1978–1979] SLR 151 where at p 135 of the MLJ, Wee Chong Jin CJ said:

> In our judgment the failure of the arbitrator to construe the contract, in particular cl 32(b) of the conditions of contract, and to consider all the facts and circumstances of the case, in particular the fact that the original completion date had been extended and it was within the contemplation of the parties that the time for completion was not of the essence of the contract amount to an error of law apparent on the face of the award.

In the circumstances, we need to examine the facts before the arbitrators and the relevant terms of the contract entered into between the parties in order to determine whether the learned judge erred in setting aside the award.

In October 1993, the respondent agreed to sell to the appellant, a company incorporated in Pakistan, and the appellant agreed to buy 6000 metric tons of RDB (refined, bleached, deodorized) palm oil.

The parties on 21 October 1993 executed the following three contracts based on the PORAM standard FOB contract format:

(a) contract No 93 11 S 79 for delivery in November 1993 of 2000 metric tons of RDB palm oil;

(b) contract No 93 12 S 80 for delivery in December 1993, of 2000 metric tons of RDB palm oil;

(c) contract No 94 01 S 81 for delivery in January 1994, of 2000 metric tons of RDB palm oils.

The appellant opened on 23 October 1993 and 14 November 1993, irrevocable letters of credit respectively for the first two contracts, that is, contract No 93 11 S 79 and contract No 93 12 S 80 thus requiring the respondent to arrange for shipment of the first two quantities of 2000 metric tons of RDB palm oil each. The appellant did not open an irrevocable letter of credit for the third contract, that is, No 94 01 S 81 and hence the respondent was not required to program shipping for the third batch of 2000 metric tons of RDB palm oil.

Pursuant to the first contract, the respondent duly made partial shipments (agreed to by the appellant) of:

A (a) 1000 metric tons of RDB palm oil on 25 October 1993; and

(b) 544.7838 metric tons of RDB palm oil on 6 November 1993.

Thus, the amounts due and payable to the respondent would be:

(a) USD 356,000.00 in respect of the first shipment of 1000 metric tons of RDB palm oil on 26 January 1994; and

B (b) USD 193,943.03 in respect of the second shipment of 544.738 metric tons of RDB palm oil on 3 February 1994.

The respondent was unable to ship the balance and on 15 January 1994, the appellant agreed to extend the shipment date to:

C (a) 28 February 1994 for the balance due under the first contract; and

(b) 20 March 1994 for the second contract.

However, on 25 January 1994 ie more than a month before the expiry of the extended shipment (as agreed by the appellant), the appellant, without notice to the respondent, took out an injunction in Azed Kashmir to stop D payment by the bank in Singapore of all monies due to the respondent. Unfortunately, it was too late to stop payment of USD356,000 in respect of the first shipment of 1000 metric tons of DRB palm oil but payment of USD193,943.03 in respect of the second shipment of 544.7838 metric tons of DRB palm oil was stopped.

E It appears that the appellant insisted on the respondent making shipment of the balance of DRB palm oil despite not paying the respondent the said sum of USD 193,943.03.

The respondent took the stand that the appellant terminated the contract and hence refused to make any further shipments to the appellant.

F The USD 193,943.03 was finally released to the respondent on 16 March 1994, about 41 days after its due date!

We have examined the record of the proceedings of the arbitrators wherein they concluded:

> G We therefore find in favor of the claimants and that the contracts should be closed out on 2 May 1994, the first business day, after the expiry of the last shipment period, April 1994, as per the respondents' proposal of 19 February 1994.

They then proceeded to award damages in the sum of USD 712,609.14 and costs against the respondent.

H The said appeal board concurred with the views of the arbitrators that the respondent was at fault and the contracts should be closed out on 2 May 1994 and upheld the arbitrators' award.

It is not disputed that the appellant agreed to the partial delivery of the RDB palm oil, a variation of the terms of the contracts and to the extension of time for the completion of the delivery of the RDB palm oil. However, I before the expiry of the extended time, the appellant stopped payment of the partial delivery of the RDB palm oil to the respondent by obtaining an injunction in Pakistan to that effect.

It would appear from the record of the proceedings before the arbitrators and the said appeal board, they found the respondent was at fault and ruled the contracts should be closed out on 2 May 1994. We do not quite understand what is meant by this finding. Possibly, the contracts should be completed on 2 May 1994 and hence held the respondent was at fault, that is, in breach of the contracts. Be that as it may, in our view, the arbitrators as well as the said appeal board failed to consider or adequately consider the legal significance of the appellant's conduct in revoking the irrevocable letter of credit given that there was an extension of time for the respondent to fulfill its obligations to ship and that time had not lapsed. In other words, it was within the contemplation of the parties that time for completion was not of the essence of the contracts.

We agree with the contention of counsel for the respondent that the appellant by stopping the payment had committed a breach and had repudiated the contracts and the respondent had accepted the repudiation. Counsel for the appellant, on the other hand, contended that even if the non-payment was a repudiation (which is denied) there was no acceptance of it. This is premised on the claim by the appellant that the respondent continued to promise performance after the non-payment. However, this promise of the respondent as appears from its letter dated 2 February 1994 to the appellant, would be on new terms arising from the problem of payment encountered earlier by the respondent. There was no response from the appellant. Thereafter, the respondent stopped further delivery of the RDB palm oil to the appellant which resulted in the reference of the dispute to the arbitrators. The conduct of the respondent, in our view, pointed to the acceptance of the repudiation by the appellant. We would reiterate that the issue of whether there was a repudiation of the contracts or not was not considered or adequately considered by the arbitrators or the said appeal board. Similarly, the issue of time for completion of the contracts is no longer of the essence of the contracts was not addressed or adequately addressed by the arbitrators or the said appeal board.

In the circumstances and for the reasons stated, we do not find any errors of law and fact committed by the learned judge in making an order setting aside the award of the arbitrators. The learned judge was correct in following the principle laid down in *The Attorney-General of Singapore v Wong Wai Cheng*, and applying it to the facts of this case.

The appeal is dismissed with costs and the order of the learned judge is affirmed. Deposit to go to the respondent towards its taxed costs.

In view of the retirement of Shaik Daud JCA, this judgment is given with the concurrence of Denis Ong JCA pursuant to s 42 of the Courts of Judicature Act 1964.

No error found on the face of the High Court judgment and appeal dismissed.

Reported by Sivapragasam P Kumaran